Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1975

NO. 75-1232

PHIL SMITH,
Petitioner

versus

~~STATE OF~~ GEORGIA
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF GEORGIA

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF GEORGIA

The petitioner, Phil Smith, prays that a Writ of Certiorari issue to review the opinion and judgment of the Supreme Court of the State of Georgia in denying a Writ of Certiorari, rendered in these proceedings on December 3, 1975.

OPINIONS BELOW

The opinion of the Court of Appeals of Georgia is reported at 136 Ga. App. 17 (1975), and appears at Appendix A, *infra*, pp. A-1-5. The Supreme Court of Georgia denied certiorari without opinion. (See Appendix C)

JURISDICTION

The original decision and judgment of the Court of Appeals of Georgia was entered on September 3, 1975. See Appendix A, p.A-1 , *infra*. Within the time provided by law, petitioner filed a motion for rehearing in said Court. Said motion was denied on October 3, 1975. (App. B). An application for a Writ of Certiorari was timely filed in the Supreme Court of Georgia, which was denied on December 3, 1975, (App. C). This petition for certiorari was filed less than 90 days from the date aforesaid. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257 (3).

QUESTIONS PRESENTED

Whether the issuance of the search warrant herein involved violates the requirements of the Fourth Amendment to the Constitution of the United States, in that no decision was made by a neutral and detached magistrate as to the veracity and reliability of the informant or his information.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment IV:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched, and the persons or things to be seized.

Constitution of the United States, Amendment XIV:

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A police officer went before a Justice of the Peace

with a written affidavit and obtained a search warrant. See Appendix D, pp. D-1 - D-3, *infra*, for copies of the affidavit and search warrant. The affidavit essentially stated that a reliable informer recently told affiant-police officer, Steve Hufstetler, that another dope user and pusher had related to the reliable informer that the petitioner, Phil Smith, had recently said by telephone to the other dope user and pusher that he (Smith) had a quantity of cocaine on the premises. The written affidavit was the only evidence on which the Justice of the Peace based probable cause for the issuance of the search warrant. The affidavit alleged neither by way of conclusion nor otherwise that the other dope pusher and user was reliable.

The warrant was issued on November 5, 1974, and, on that date, officers conducted a search of the premises named in said search warrant. A small quantity of drugs was seized at that time, along with a sawed-off shotgun and a small quantity of non-tax paid liquor. On February 3, 1975, the Grand Jury for the Superior Court of Barrow County, Georgia, returned two indictments, charging the petitioner with violations of the Georgia Controlled Substances Act, the Georgia Firearms and Weapons Act, and possession of non-tax paid liquor. (R-3, 5).

On February 8, 1975, petitioner filed a motion to suppress, alleging that he was "aggrieved by an illegal search and seizure in violation of his rights as a citizen of the United States under the Fourth and Fourteenth Amendments to the Constitution of the United States". (R-7). A hearing was held on March 28, 1975, to consider the motion, said motion subsequently being overruled. (R-15). On the same day the trial court judge issued a certificate for immediate review. (R-16). A timely appeal was then made

to the Court of Appeals of Georgia. Throughout the appeal the petitioner has asserted that the search warrant was illegal based on said Constitutional provisions. The outcome of the appeal is set forth in the Jurisdictional Statement, *supra.*

REASONS FOR GRANTING THE WRIT

Pursuant to Rule 19(1) (a) of the Supreme Court of the United States, the Court of Appeals of Georgia has decided a federal question of substance in a way not in accord with applicable decisions of this Court. In holding that there was no error in denying petitioner's motion to suppress, the Georgia court has allowed one other than a neutral and detached magistrate to determine the reliability of the informant's information. This decision contravenes the holdings of *United States v. Harris*, 403 U.S. 573 (1971); *Aguilar v. Texas*, 378 U.S. 108 (1964); and *Jones v. United States*, 364 U.S. 257 (1960).

The Court of Appeals of Georgia held, "even though this affidavit is based principally upon 'hearsay on hearsay', it meets the minimal qualifications for sufficiency of hearsay of an informant to support issuance of a valid warrant when: (1) the affiant gave the underlying circumstances supporting his conclusions, and his belief that the informant (Source A) [the reliable confidential informant who contacted the affiant] was credible; (2) the affiant gave the basis for his determination that his informant's information was reliable; (3) *the underlying circumstances of Source A's determination of reliability of information* from Source B [the other dope pusher and user] was contained therein; and (4) the underlying circumstances from which both informants concluded the contraband was where they said

it would be." See Appendix A, p. A-4, *infra.* Under any of the holdings cited above, the minimum standard has not been met in the instant case.

First the Georgia Court goes to great pains to establish the principle that "hearsay on hearsay" is permissible when determining probable cause. See Appendix A, pp. A-4 - 5, *infra.* The petitioner agrees with the Court's conclusion and has *never* contended, either directly or by inference, that "hearsay on hearsay" curtailed the sufficiency of the warrant. The Court was totally on its own when discussing this issue.

Relating more to the sufficiency of the search warrant, no underlying circumstances of Source A's determination of Source B's reliability are contained in the warrant, as required by Section 3 of the Court of Appeals test quoted above. First and foremost, Source A cannot determine the reliability of Source B's information. The sole judge of reliability, according to the Fourth Amendment, is a "neutral and detached magistrate". See also *Aguilar, supra* at 115. This responsbility cannot be relinquished or waived.

Second, no circumstances are contained in the warrant upon which a magistrate could base a decision as to whether Source B's information was reliable. The Court of Appeals of Georgia places great emphasis on the fact that Source A made declarations against his own penal interest. In *Harris, supra,* at 583, the Court states, "People do not lightly admit a crime and place critical evidence in the hands of the police in the form of their own admissions. Admissions of crime... carry their own indicia of credibility – sufficient at least to support a finding of probable cause to search." Though Source A made such admissions to the affiant-police officer,

they only lend credibility of Source A, which was unquestioned. The basic issue centered around the reliability of Source B and its information. Source B made no admissions to the police, as evidenced by the Affidavit (Appendix D, p.D-1 *infra*) and the opinion of the Court of Appeals (Appendix A, p.A1, *infra).* His statement was given to Source A, in confidence, with no knowledge that the information would be passed to a law enforcement agency. Source A even admits that at the time of receiving the information he had no intention of relaying it. Thus, Source A's admissions do nothing to establish the reliability of Source B's information.

Furthermore, though a link is established between Source A and Source B based on a "drug-dealing partnership", there is no indication of any recent purchases by Source B from the petitioner. The affidavit states that the two Sources *had* dealt on a partnership basis in the past and that Source B "regularly" bought drugs from the petitioner. However, nothing is presented to indicate what regular means to the informants - once a week or once every two years, nor whether the partnership existed at the time the information was received.

Finally, there are no allegations as to Source B's reputation in the community or anything else which would tend to establish reliability on its part. The only facts about Source B's background that were disclosed are that it is a dope user and dope pusher. Unless there is inherent reliability in dope pushers and dope users, no facts are given which tend to support the truthfulness of the information.

Thus, the only underlying circumstance of Source A's determination of the reliability of Source B's information

contained in the affidavit is Source A's statement "that it knew of no reason why Source B would lie to it". See Appendix D,p.D1, *infra.* Petitioner contends that no determination ban be made upon the facts given, and that the Court of Appeals has allowed Source A, instead of the neutral and detached magistrate, to assess the reliability of Source B's information.

As to Section Four of the Court of Appeals of Georgia test, the only underlying circumstance from which both informants concluded the contraband was to be where they said it would be was an alleged telephone call from the petitioner to Source B. Without any circumstance which would add credence to Source B's information, there is nothing to indicate that this is fact rather than a casual rumor. In *Spinelli v. United States,* 393 U.S.410,416, (1969), it was held that, "in the absence of a statement detailing the manner in which the information was gathered, it is especially important that the tip describe the accused's criminal activity in sufficient detail that the magistrate may know that he is relying on something more substantial than a casual rumor circulating in the underworld or an accusation based merely on an individual's general reputation." *Draper v. United States,* 358 U.S. 307 (1959), is cited as a suitable benchmark in respect to the quantum of detail required. In *Draper, supra.* the informant told the affiant, *in minute detail,* where the defendant had gone, how much heroin would be in his possession when he returned, and the clothes he would be waring. The Court concluded that this was sufficient.

In the case sua sponte, no such detailed information is given. The only evidence upon which the informants conclude that the information is correct is an alleged tele-

phone call in which the petitioner discloses the presence of cocaine on the premises described. The petitioner asserts this cannot be distinguished as fact rather than a mere casual rumor.

Under the test set forth in *Aguilar, supra.* at 114, "the magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant . . . was 'credible' or his information 'reliable' ". The Court of Appeals of Georgia stated in its opinion, "strick application of the 'two prong' test of *Aguilar* . . .would appear to require that an affiant vouch for the credibility of Source B, . . ., or the reliability of his information." Appendix App. A-2-3,*infra.*The Court agreed with the petitioner that the affiant could do neither in the instant case. Appendix A, p. A-3, *infra.*

However, the Georgia Court viewed the holdings of *Harris, supra* and *Jones, supra,* as the refinements on the *Aguilar* test. Under these decisions, the basic inquiry is whether the informant's present information is truthful or reliable [*Harris, supra*], and once a substantial basis is laid indicating the veracity of the informant's present information, probable cause may be found [*Jones, supra*]. See Appendix A, pp. A-2-3, *infra.*

Under either test the search warrant must be found insufficient. As stated above, the affiant cannot vouch for the credibility of Source B or its information. Nor has a substantial basis been laid to establish probable cause. The only information, once again, is that Source B is a dope pusher and user and claims to have been contacted by phone by the petitioner. Under no stretch of the imagination can this in-

formation suffice under the ruling of *Draper, supra.*

In conclusion, no underlying circumstances have been submitted to a neutral and detached magistrate upon which a rational decision can be made on whether probable cause exists. Therefore, the magistrate has allowed Source A to determine the truthfulness of Source B's information, and in doing so, infringed upon the petitioner's rights found in the Fourth Amendment to the Constitution of the United States.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment of the Supreme Court of Georgia in denying certiorari, and the opinion of the Court of Appeals of Georgia in affirming the validity of said search warrant.

RESPECTFULLY SUBMITTED,

HUDSON AND MONTGOMERY

BY: _____
Attorneys for Petitioner,
Phil Smith

316 Southern Mutual Building
Athens, Georgia 30601
(404) 549-9823

CERTIFICATE OF SERVICE

I, of counsel for Phil Smith, petitioner in the above matter, do hereby certify that I have, prior to filing, served a copy of the foregoing on Honorable Nat Hancock, District Attorney, Piedmont Judicial Circuit of Georgia, % Jackson County Courthouse, Jefferson, Georgia, and upon Honorable Arthur Bolton, Attorney General of the State of Georgia, 132 State Judicial Building, Atlanta, Georgia, 30334, pursuant to Rule 21 (3) of the Supreme Court Rules.

This 27th day of February , 1976.

J. M. Hudson

APPENDIX

APPENDIX A
OPINION OF GEORGIA COURT OF APPEALS

In the Interest of time, this Opinion is sent to you without proofreading or other editorial inspection. It will be appreciated if counsel will notify the Clerk of the discovery of typographical errors.

SEP 3 - 1975

50892 SMITH V. THE STATE

CLARK, Judge.

On November 5, 1974 a police officer went before a justice of the peace to obtain a search warrant. His affidavit stated that he had been contacted by a reliable confidential informant who had given information on two prior occasions which led to three arrests and recovery of drugs. This informant, referred to as Source A, had spoken to another person - Source B, within seven days prior to November 1, 1974. Source A had known Source B for over two years and they had purchased, possessed and sold drugs together "on a partnership basis." Source A stated that Source B regularly bought drugs from the defendant and he had been with Source B when he (B) bought drugs from the defendant. Source B informed Source A, within seven days prior to November 1, 1974, defendant had spoken to him by telephone and said he had a quantity of cocaine at his premises. Source B did not know that Source A would give this information to a law enforcement officer. The affiant had previously interviewed other "sources" who stated they had bought or seen drugs at defendant's home. Police records revealed defendant had been arrested for sale of one drug and possession of marihuana. The warrant issued and the en-

suing search on November 5, 1974 resulted in confiscation of marihuana, codeine, phencyclidine, non-tax-paid alcohol, and a sawed-off shotgun. Defendant's motion to suppress was overruled. He appeals. *Held:*

1. The affiant's recitation in the affidavit of the confidential informant's information was hearsay. Hearsay may support the issuance of a valid warrant if the magistrate is informed of some of the underlying circumstances supporting the affiant's conclusions and his belief that the informant was credible or his information reliable. United States v. Ventresca, 380 US 102, 108 (1965); Grebe v. State, 125 Ga. App. 873 (189 SE2d 698). There must be a substantial basis for crediting such hearsay. Jones v. United States, 362 US 257 (1960).

Strick application of the "two-prong" test of *Aguilar*, that the magistrate be informed - (1) "of some of the underlying circumstances from which the informant concludes that contraband, such as narcotics, is where he claims it is"and (2) "some of the underlying circumstances from which the officer concludes that the informant, whose identity need not be disclosed, is credible or his information reliable," would appear to require that an affiant vouch for the credibility of Source B, or the reliability of his information. Aguilar v. Texas, 378 US 108 (1964). However, in United States v. Harris, 403 US 573 (1971), the Supreme Court held that an averment of the informant's previous reliability is unnecessary, as "the inquiry is, as it always must be in determining probable cause, be whether the informant's present information is truthful or reliable." See Meneghan v. State, 132 Ga. App. 380 (208 SE2d 150); Davis v. State, 129 Ga. App. 158 (198 SE2d 913); Compare - Sams v. State, 121 Ga. App. 46 (172 SE2d 473); Brown v. State, 130 Ga. App. 11 (202 SE 2d 268). Mr. Chief Justice Burger, in *Harris*, stated that

"[i]n determining what quantum of information is necessary to support a belief that an unidentified informant's information is truthful, Jones v. United States, *supra*. is a suitable benchmark." 403 US at 580. Jones v. United States, 362 US 257 (1960), held that observations of an informant, although hearsay, are sufficient to establish probable cause "so long as a substantial basis for crediting the hearsay is presented. . . ."

We do not find the sufficiency of this affidavit to be curtailed by the "hearsay on hearsay" character of some of the information contained therein. We are not aware of a specific objection to "hearsay on hearsay," in the issuance of a warrant, but in United States v. Roth, 391 F2d 507, 511 (7th Cir. 1967), the court addressed the issue of "inherently defective hearsay on hearsay as that "as to which there is absent any indication of the reliability of the anonymous hearsay source." In the affidavit under review here, the anonymous source was shown to have been a "partner" in the drug dealing business with the known and reliable informant of the affiant and had "regularly bought drugs" from the defendant - which was confirmed by personal observation of the known reliable informer. Thus, it is understandable, reasonable, and probable, that the defendant would notify one of his regular purchasers of his possession of cocaine - presumably for purpose of sale. The Federal Third Circuit Court affirmed United States v. Carney, 328 F. Supp. 948 (Del. 1971) in which "double hearsay" was used to support issuance of a warrant, with the comment that neither *Spinelli* (393 US 410 (1969)) nor *Roth*, supra, condemned "double hearsay" in a context where the reason for the reliability of the original source was contained in the affidavit. United States v. Carney, 455 F2d 925 (3d Cir. 1972). Our holding comports with these decisions.

Accordingly, although we have no affiant to vouch for the credibility of the confidential informant's confidential informant this would not deter us, provided we were convinced there was a substantial basis for crediting the hearsay, together with the affiant's reasons for his conclusion as to the credibility of Source A, or the affiant's basis for his belief that the information from Source A was reliable. Cf. Davis v. State, 129 Ga. App. 158 (198 SE2d 913).

Source A's declarations against his own penal interest furnished additional reason for crediting his information and supporting the finding of probable cause. United States v. Harris, 403 US 573 (1971). The description of the overall criminal activity of both informants with the defendant could have been sufficient to convince the justice of the peace that he was relying on something more than a casual rumor circulating in the underworld or an accusation based merely on the individual's general reputation. Spinelli v. United States, 393 US 410 (1969); Jackson v. State, 130 Ga. App. 6 (202 SE2d 206).

In a doubtful or marginal case, a search under a warrant may be sustainable where without a warrant it would fall. United States v. Ventresca, 380 US 102, 106 (1965). Even though this affidavit is based principally upon "hearsay on hearsay" it meets minimal qualifications for sufficiency of hearsay of an informant to support issuance of a valid warrant when: (1) the affiant gave the underlying circumstances supporting his conclusions, and his belief that the informant (Source A) was credible; (2) the affiant gave the basis for his determination that his informant's information was reliable; (3) the underlying circumstances of Source A's determination of reliability of information from Source B was contained therein; and (4) the underlying circumstances from which

both informants concluded the contraband was where they said it would be.

A fair reading of the entire affidavit reveals that there was substantial basis for crediting the hearsay and for the justice of the peace to conclude the contraband was probably where the informant said it was (Rugendorf v. United States, 376 U.S. 528 (1964), particularly when the informant's information is reasonably corroborated by other information within the affiant's knowledge. Jones v. United States, 362 U.S. 257 (1960).

Judgment affirmed. Pannell, P. J., and Quillian, J., concur.

APPENDIX B

ORDER OF SUPREME COURT OF GEORGIA DENYING WRIT OF CERTIORARI

CLERK's OFFICE, SUPREME COURT OF GEORGIA

Atlanta 12/3/75

Dear Sir:

Case No. 30616, Smith v. State

The Supreme Court today denied the writ of certiorari in this case.

Very truly yours,

MRS. JOLINE B. WILLIAMS, Clerk

APPENDIX C

ORDER OF COURT OF APPEALS OF THE STATE OF GEORGIA DENYING MOTION FOR REHEARING

COURT OF APPEALS
of the State of Georgia

ATLANTA, October 3, 1975

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

50892 Phil Smith v. The State

Upon consideration of the motion for a rehearing filed in this case, it is ordered that it be hereby denied.

Note: Please remove original page 4 and insert attached page 4.

Court of Appeals of the State of Georgia
Clerk's Office, Atlanta
Oct 3 1975

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Morgan Thomas, CLERK

APPENDIX D

AFFIDAVIT OF STEVE HUFSTETLER

AFFIDAVIT FOR A BARROW COUNTY JUSTICE OF THE PEACE SEARCH WARRANT FOR THE ENTIRE PREMISES OF ROUTE 2, WINDER, GEORGIA, BEING A SINGLE FAMILY DWELLING, RED IN COLOR ON THE FRONT, WHITE IN COLOR ON THE LEFT SIDE WITH A WHITE BUILDING ON THE RIGHT SIDE AND A POND IN THE REAR, PRESENTLY OCCUPIED BY PHIL SMITH AND LOCATED IN BARROW COUNTY ON HIGHWAY 53 ON THE RIGHT APPROXIMATELY ONE AND ONE HALF MILES FROM THE INTERSECTION OF HIGHWAY 53 AND HIGHWAY 29. THE ABOVE DESCRIBED PREMISES IS LOCATED ABOUT 250 YARDS DOWN A DIRT DRIVE OFF HIGHWAY 53.

Within the past seven days prior to November 1, 1974 affiant was contacted by a reliable source who wishes to remain confidential. This source is believed to be reliable because it has given information on at least two occasions in the past which has led to the issuance of two search warrants and has led to a minimum of three arrests and the recovery of drugs. Furthermore, this source gave sufficient detail to indicate it knew what it was talking about. This source has also admitted to participation in crime in the past. It is affiant's experience a person will not normally do this unless telling the truth.

At the time of the above mentioned conversation, the above mentioned source, who will hereafter be referred to as Source A, stated that within seven days prior to November 1, 1974 it (Source A) had spoken to a person who will here-

after be referred to as Source B. Source A stated that Source B has been known to it (Source A) for a period exceeding two years. Source A added that Source B has used drugs at least the period of time since it (Source A) met Source B. Source A also stated that it (Source A) and Source B had used drugs together and had sold drugs on a partnership basis. Source A further stated that Source B regularly bought drugs from Phil Smith at the above described premises. Source A said that it (Source A) had been to the residence of Phil Smith described above with Source B to purchase drugs.

Source A stated that Source B had told it (Source A) that it (Source B) had spoken to Phil Smith by telephone within seven days prior to November 1974 and Phil Smith told Source B that he (Smith) had a quantity of cocaine at his premises. Source A stated that Source B had no knowledge that Source A would give the above information to any law enforcement officer. Source A further stated that at the time it spoke to Source B, it (Source A) had no intention of relaying the above information to law enforcement officers. Source A stated that it knew of no reason why Source B would lie to it.

Source A also stated that it has known Smith to hid drugs on the above described premises.

In corroboration of the above information affiant checked arrests records at the Metro Drug Squad which revealed that Phil Smith gave his address as Route 2, Winder, Georgia. Affiant also has had at least three confidential sources in the past which have described the location of Phil Smith's house as being the same as described above. One of these sources is a police officer and it stated that it has known Smith for over five years. The law enforcement source took affiant on Highway 53 and pointed out the home

of Phil Smith described above to affiant. Records also reveal that Phil Smith has been arrested for sale of M.D.A. (methyldioxyamphetamine) and for possession of marijuana.

Affiant has also interviewed other sources in the past who have stated that they have bought drugs from Phil Smith's house and/or they have seen drugs at Phil Smith's house.

For the above reasons affiant has probable cause to believe that there is now cocaine on the above described premises.

/S/ Steve Hufstetler,
Affiant

Sworn to and subscribed before me this 5th day of November, 1974.

/S/ B. L. Jones
JUSTICE OF THE PEACE